Central Law Journal.

ST. LOUIS, MO., JULY 4, 1913.

A WAY TO STOP INJUNCTIONS AGAINST RATE LAWS.

In legal theory uniform rates are iridescent dreams, even though they may be the inevitable result of competitive conditions. A statute, therefore, which attempts to fix flat rates for a public utility is a paradox. Ere long it may be a sort of maverick in the law.

The only way it can work out is to take the highest fairly compensatory rate any one of a class of public utilities is entitled to charge and say it shall be the rate for all. Even then the statute may not be deemed any other than a temporary law, as next year or the year after the prescribed rate may not be compensatory to some one or more of the utilities involved.

But the permanence of a uniform rates law has still another Damoclean danger hanging over it, as or not being free from the charge that it is confiscatory. Concede that the rates case (Simpson v. Shepard, 33 Sup. Ct. —) lays down the rule that a railroad is entitled to ask a fair return upon the value of that which it employs for the public convenience, there exists no legal definition of "a fair return." Manifestly "fair return" means earning a proper percentage upon what is invested, but what is a proper percentage might be one thing to the mind of one judge and another thing to the mind of another judge.

We imagine also this might vary greatly in different classes of public service companies, because of variance in stability in patronage sought or for casualties, especially in hazardous employments, bringing on extraordinary liabilities and even because of *vis major* or acts of God. So also a "fair return" in one section of this country, taken comparatively with other businesses, might be far different from "a fair return" in another.

But whatever this may mean, it should not be left for a court to pass upon as a question of fact, nor for a jury either, if "fair return" may be legislatively defined.

What is certain from the rates decision is that no statute can create a uniform rate for the same service, unless it prescribes the highest rate demandable by any company supplying the service. When this is done it results that the public overpays all of the others. Even then, as above said, changed conditions may make this rate confiscatory, because it does not give "a fair return upon the value of that which a company employs for the public convenience."

It therefore may be said there is an injunction watermark in every enrolled maximum rate bill. It carries potential confiscation, and confiscation means unconstitutionality.

May it be declared by law what percentage a public utility is entitled to earn and how that "which a company employs for the public convenience" may be lawfully appraised? The question seems answered by the course which the rates decision adopts to ascertain whether a statute fixing a flat rate is or not confiscatory, i. e., is or not constitutional. If the court assumes to appraise and then determine whether or not a certain rate will yield what the company is entitled to earn, this is but the taking on of an administrative function, because it is the only thing to do to save a constitutional right. It certainly seems little suited for such a task and ought to be relieved of its exactions.

If it is lawful, then, for a legislature to say that a railroad, for example, is entitled to earn say eight per cent upon its investment and that commissioners shall appraise its property and determine what rates as to different things it may charge, so as to net to it such per cent, then the day of injunction against a law as being confiscatory will have passed. The law being constitutional, there is nothing to object to but methods in its application.

Of course, there will be left the question of lawful orders by such a commission to

accomplish the end in view, but who that has witnessed the success of such a body as the interstate commission but must believe this a better plan, than for the operation of rate laws being repeatedly assailed as confiscatory.

A court will attribute to such a commission the presumption of having superior knowledge to it in all questions of fact, and that its administrative orders will be corrected when shown to be in need of correction. There is expert knowledge required in rate-making as well as in jurisprudence, and a judge should no more be thought competent in the former than is a business man, or, possibly, even as much so.

NOTES OF IMPORTANT DECISIONS

JURISDICTION AVERMENTS IN PETITION TO CREATE JOINT LIABILITY.—The Supreme Court of Missouri had about as difficult a time in getting around to a proper ruling in the case of State ex rel Dutcher v. Shelton, 156 S. W. 955, as we remember ever to have witnessed. A minority of two of the seven judges dissented and this should have been the ruling had there not been another principle involved, which was not noticed either by the majority or minority opinion.

The case was one of prohibition (which was granted) against a Circuit Court's entertaining jurisdiction upon the ground that no cause of action was stated against the defendant sued in his proper county, upon joint liability.

The petition, after reciting that the defendant, as to whom if sued singly the venue was elsewhere, had obtained a judgment, its being appealed, reversed in division and afterwards affirmed in banc of Missouri Supreme Court, states that intermediate said reversal and affirmance "these defendants authorized plaintiffs to employ other and additional attorneys to represent said Marie Dutcher (defendant as to whom venue was elsewhere if sued singly) in said Supreme Court and authorized and directed and requested that plaintiffs employ and offer to pay them the sum of two thousand ($2,000) dollars, conditioned upon said judgment of said circuit court being affirmed and said judgment being collected." Then it is recited that plaintiffs employed additional counsel and obligated themselves to pay them such sum as conditioned; the incurring of expense for brief; the rendition of service by additional counsel and the assignment by additional counsel of his claim for services rendered to the plaintiffs.

The minority view was that petition averred a joint liability, but the majority seem so filled with knowledge that these plaintiffs and the additional counsel were merely co-counsel for the non-venue defendant that they were unable to read the petition without carrying this fact into it. Thus they say: "The petition states that H. (the additional counsel) and C. & E. were attorneys of relator in her case against the Wabash Railway Company * * * and that he and they discussed with her the advisability of employing additional counsel in her case, not his, to assist them" etc. We, like the minority, find not a word to this effect in the petition.

But there is a view not treated by either opinion which we think shows the majority decision correct and this is that the promise by the third person was *nudum pactum*. We admit that an executory consideration takes the place of a present one by relation back, but this rule may not apply to a third person making a promise. It has been said that, if services to another are rendered upon express request, a subsequent promise to pay is valid, but as showing that a mere precedent request binds to nothing though the service is afterwards performed Rankin v. Beale, 68 Mo App. 325, is instructive. This case shows that a father requested a physician to attend his son of full age and afterwards promised to pay for the services rendered. It was said the request did not raise an implied promise sufficient to support the subsequent promise. There is not even here an averment of subsequent promise.

The cases on this subject generally are of the third person being solely looked to but here the claim is of joint liability and there is no averment that the services were given in consideration of both defendants rather than one making request therefor. The word "authorized" has no relevancy whatever in the petition as the third person had no authority he could extend.. A further reason for the rightfulness of the majority conclusion is that the petition does not aver that the judgment had been collected, which not only fails to show the obligation to pay had matured, but the condition tends also to show that the venue defendant only promised as surety or guarantor, and he is not charged as such. Are such promises in any legal sense joint? The obligation of each is independent and the fact

of their being concurrent or contemporaneous does not make them otherwise.

EMINENT DOMAIN — IRRIGATION PROJECT TO BENEFIT LANDS IN ADJOINING STATE.—It is not only that interstate commerce is bringing to the fore the question of state rights, but state lines are in evidence in a question of eminent domain in a late decision by the Supreme Court of Wyoming. Grover Irr. & Land Co. v. Lovella Ditch R. & Irr. Co., 131 Pac. 43.

Irrigation as a public purpose authorizing the condemnation of private property is well established in the arid states, but the case cited denied the exercise of the right of condemnation of land in Wyoming by a Colorado corporation for the benefit of lands in Colorado. The court said that the public purpose was development of the resources of a state in the reclamation of its own lands and that indirect benefits to the state from the reclamation of land in a neighboring state were not to be considered. Therefore it was decided that land could not be condemned under Wyoming statute for the purpose of locating the headgate and part of a ditch for an irrigation system to reclaim land in Colorado.

It was further said that for the statute to be thus used was to give it extra-territorial operation. Cases in support of this position are found under what are called the "Mill Acts," viz: Wooster v. Great Fall Mfg. Co., 39 Me. 246; Salisbury Mills v. Forsaith, 57 N. H. 124; Gould on Waters (3rd ed.) §593; U. S. v. Ames, 1 Woodb. & M. 76, 1 Fed. Cas. No. 14,441.

The benefits in the Wyoming case may appear somewhat more directly than those under the "Mill Acts," merely because there is a system in irrigation that is beneficial to a portion of our country, without regard to state lines, somewhat in the same way as regulation of interstate commerce is supposed to be, while under the "Mill Acts," it was more in incidental matters that land in one state was needed for a mill located in another, but at bottom the identical principle is involved. But if developing land just over the line of a state materially would tend to progress and prosperity in two states, it ought to be that we should be one country as to that. Certainly if the landowners in either state only were to be benefitted the purpose would not be a public one at all. It is the indirect more than the direct result that justifies the exercise of the power, and it is not conclusive of the question to assert that the statute is made to have extraterritorial operation. By the same token, if there were an irrigation system for reclaiming land in two states, condemnation could be restrained to so much property only as was reasonably necessary for reclamation of land in one.

BENEFICIAL USE AS THE BASIS FOR GREATER UNIFORMITY OF STATE LAWS GOVERNING WATER.

It is a well settled principle of the law of waters of this country, and one which has been decided by the Supreme Court of the United States in a number of cases, and strenuously insisted upon by the States, that each State of this union, has the right as sovereign, to adopt such law or laws governing and controlling the distribution and use of waters flowing or standing within its boundaries, as it sees fit. It may determine for itself, whether the common law of riparian rights or the Arid Region Doctrine of appropriation shall control. No State can legislate for, or impose its policy upon another State. Neither can Congress enforce any particular rule in this respect, upon any State.[1]

Although there has been no concurrent action, the laws of the various States of the arid or semi-arid west, due largely to the physical cause of the great scarcity of water, have gradually been becoming more and more uniform with each other. This is true especially during the last decade. The cause of this, is that many statutes, when first adopted, by a certain State, were experimental in their nature. Some have not stood the test of time; and, therefore, have been consigned to oblivion. Others have been found adequate to meet the situation and conditions of the State where they first originated, and, not only have been continued in force in that State, but have also been adopted by the Legislatures of other States. All this has tended toward the

(1) Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 957, 27 Sup. Ct. Rep. 655.

uniformity of laws between the respective States. Take for example, the Irrigation District Law, or Wright Law. It originated in California, and that State was the battle ground where its constitutionality was fought out. But, after this was decided, the law was retained in that State as one of its systems of laws governing waters, and the principal features of that law have also been adopted by thirteen of the other States, including the new State of Arizona, which adopted the District Law at a session of its Legislature this present year.

As stated before, the great physical cause tending toward uniformity, was the universal scarcity of water throughout this Western country. The question of always being, under what law or system of laws can a given quantity of water be made to do the greatest duty? Hence, the adoption by the courts of the rule of beneficial use; or, as afterwards stated in statutory language, in many of the Western States: "Beneficial use shall be the basis, the measure, and the limit of the right to the use of water in this State."

This rule, although enforced by different methods in the respective States, has probably been the greatest influence tending toward uniformity of laws between them. The ultimate end is the same, although the means of arriving at such end may be different.

From a legal standpoint, as known in this Western country, what is the beneficial use of water? It may be stated as follows: It is that the quantity of water which can be lawfully claimed under a prior appropriation is limited to that amount which is needed, and within the amount claimed, which within a reasonable time is actually and economically applied to the beneficial use or purpose for which appropriation was made, or to some other beneficial use or purpose.

The time has passed in the history of irrigation and water rights when an appropriator can lawfully claim all the water in sight by virtue of his appropriation, or as was recently stated in an Oregon case, "To keep all you get, and get all you can."[2]

Even although prior in time to others, unless all of the water claimed is actually applied economically and without waste to the beneficial use for which it is claimed, it is not held, in most jurisdictions, that as to the surplus not so used, there is no appropriation. So, where a water hog would rather raise tules than alfalfa, cat-tails than grain, goose-grass than potatoes, while others on the same stream are suffering for the want of water take the tip, that he is claiming and using more water than he is entitled to, and go and claim a portion of it, and see how readily the courts will support your contention. The ultimate question for the court to determine in such a case, is not how much water the prior appropriator required to properly irrigate his land, not the quantity of water covered by his claim, not the carrying capacity of his ditch, but what amount he had actually applied economically and without waste for a term of years prior to the time when the subsequent appropriator made his claim.[3]

The rule of beneficial use, has also had its effect in damage suits, and, therefore, has caused greater uniformity of decision by the courts in cases of this nature. Neither appropriators nor riparian proprietors have the title to the water while it is still flowing in the natural streams. Their right in either case is merely usufructuary. Or, in other words, they may own the right to the use of a certain amount of the water as long as they actually apply it to some beneficial purpose. And, upon the question of damages, under the more recent decisions of the Western States, the tendency is more and more for the courts to hold that the right of a person to the natural flow of a stream, is based upon this usu-

(2) Andrews v. Donnelly, —Ore. —, 116 Pac. Rep. 569.

(3) Salt Lake City v. Gardner, — Utah, —, 114 Pac. Rep. 147.

fructuary right only. The water must be actually used in order to sustain a claim to the same. If this is not done, some subsequent claimant may legally lay claim to either the surplus unused or to the whole amount covered by the prior claim during the periods of nonuse, and for such action the prior appropriator or riparian owner, cannot successfully maintain an action and recover even nominal damages. Before he can recover damages, he must have sustained some actual, material and substantial injury to his rights; and if such rights are not injured, of course, no recovery can be had.

Beneficial use has also had its influence toward greater uniformity of court decisions in actions for injunctions throughout this Western country. This is especially true in those States which attempt to maintain a dual system of laws governing waters. The Arid Region Doctrine of appropriation and the common law of riparian rights, as construed in most of the Eastern States of this country, and indeed by the Western courts in those States which still adhere to the common law of riparian rights, until a comparatively recent date, a riparian proprietor is given the aid of equity to prevent the diversion of the waters of a stream which runs through or adjoins his land, from its natural channel, although he may have made no use of the water himself or have sustained no pecuniary damages from its use by others. In other words, under this construction, an action in equity will lie to maintain the undiminshed flow of the stream as it was wont to flow by nature, unimpaired in quantity and undeteriorated in quality. This rule is regarded as absolute, and as a part and parcel of the land adjoining which the stream naturally flows, and that, too, regardless of the fact as to whether the water was being put by the riparian owner to any actual use, other than the incidental benefit of having the stream flow by his land. Under this construction, the party diverting the water might be put to great expense in the construction of his works, and yet the court will compel the restoration of the flow to the natural channel of the stream. As was said upon this subject, in a leading Eastern case: "The necessity of one man's business cannot be the standard of another's right in a thing which belongs to both."[4]

The injunction, under such a construction of the common law, will be granted and that, too, without proof of use by, or damages to the riparian owner bringing action. This construction of the common law rule, until a comparatively recent date, was followed by some of the Western courts.

But, in the evolution of the law of the water rights in the Western States, the courts of those States have considerably changed their attitude upon the question of the right of a riparian proprietor to maintain an action for an injunction against the diversion of the waters of a stream, where such waters flow mostly over the public lands and are needed for irrigation, and where the riparian owner is not actually applying the water to some beneficial purpose, and also where he is not materially injured by the diversion of a certain quantity of the flow before it reaches his land. Therefore, the distinction must be noticed in the more recent decisions of the courts of these States where the right claimed is merely the undiminished flow of a stream by a riparian proprietor, between the construction of the strict common law rule of riparian rights as the same is recognized and enforced in England and in the Eastern States, and even as between the earlier decisions of some of the Western courts and their more modern decisions. Upon theory that all of the existing water supply should be for actual use, in those Western States which adhere to the modified form of the common law, the courts are now loath to grant equitable relief on behalf of a riparian proprietor on account

(4) Wheatley v. Crisman, 24 Pa. St. 302, 64 Am. Dec. 657, 11 Morr. M. Rep. 524.

of the mere diminished flow of a stream, caused by the diversion of the water above his lands, without actual material damage to him, and where the water diverted is applied to some beneficial use or purpose. And, therefore, it may be regarded as the settled rule of the most of the Western States, in such cases that the court will consider all of the equities of the case; and, without prejudice to an action for damages, will refuse to grant an injunction.

We deem the true rule to be that the lower riparian owner owing a usufructuary right to the water, seeking the injunction must show some real, material and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water and that too, regardless of the fact as to whether such upper claimant claims his right to the use of the water as an appropriator or as a riparian owner using more than his just proportion of the water, after taking into consideration the equal or correlative rights of the other owners, under the strict construction of the common law doctrine. And, we will add that, owing to the great need and scarcity of water in this Western country, and the necessity that all of the available water supply to be put to some beneficial use or purpose, the courts and the Legislatures are rapidly coming to this view. Such was the ruling of the Supreme Court of the United States in the case of Kansas, claiming as a riparian proprietor the right to the undiminished flow of the stream of the Arkansas River, without actual use, as against the State of Colorado, and certain appropriators therein, where the water diverted was used for irrigation of arid lands, although the court found that there was a perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet, to the great body of the valley it has worked little, if any detriment."[5]

(5) Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 959, 27 Sup. Ct. Rep. 855.

And Mr. Justice King, in commenting upon this last case in Oregon, said that it "Is a strong and commendable tendency on the part of that great court to recognize that the rigid rules of common law, as interpreted and sought to be applied by those insisting upon the 'undiminished flow' theory, are inapplicable to the many new and intricate questions necessarily arising under our form of government and throughout the arid and semi-arid sections."[6]

But the California court is at present in hopeless confusion upon this subject. Ever since the case of Lux v. Haggin.[7]

The California court has strenuously endeavored to maintain side by side, both the common law of riparian rights and the Arid Region Doctrine of appropriation. In doing this, the court has, at times, gotten itself into many peculiar positions and from which it has had to recede. One of the best illustrations are the different decisions of that court upon the particular phase of the subject under discussion. For example, in the case of Modoc, etc., Co. v. Booth, decided in 1894,[8] it was said: "In a State like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated it is difficult to lay down a rule as to riparian rights which will be applicable to and cover all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners diverting any water from the stream at points above him, simply because he wished to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when

(6) Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.
(7) 69 Cal. 255, 10 Pac. Rep. 674.
(8) 102 Cal. 156, 36 Pac. Rep. 432.

the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it."

But in the later case of Gould v. Eaton, decided in 1897, exactly the contrary was held to the above, and in the decision the court said that: "If he does not in fact use any of the water himself, the inferior proprietor has a right to flow of the entire stream. The paintiff's right to an injunction does not depend upon the amount of injury which he has received."[9]

And in a case decided in 1908, the court in adhering to the same rule, also said: "Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from a reasonable use by other proprietors.

This is a right of property, and part and parcel of the land itself, and the plaintiffs are entitled to have restrained any act which would infringe upon this right."[10]

Then in a case decided by the Supreme Court in 1910, the same court, following the early rule laid down in the Booth case, said: "Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this State. The lower claimant must show damage to justify court of equity in restraining an upper claimant from his beneficial use of the water. The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this court will refuse to approve and follow the doctrine." "If the doctrine announced in Gould v. Eaton, supra, may be thought to confer upon a riparian proprietor greater than these, namely, the right to have all the water of the stream at all times flow past his land without regard to the question as to whether or not any diminution of the flow does or could injure him, then it must be said that the doctrine of Gould v. Eaton is to this extent modified by the later decisions."[11]

But the California courts could not rest their decisions upon this rule, but receded from the position taken in the last quoted case, and again adopted the rule as laid down in the overruled case of Gould v. Eaton. And as stated by the California Court of Appeals in a case decided April, 1911: "The rights of a riparian proprietor as such are not to be tested by the use or uses to which he puts the riparian waters, or whether he uses them at all or not. If one's land are riparian to a stream of water the owner of the lands cannot be divested of his rights as a riparianist merely because he may either put the water flowing in such stream to other than riparian use or not use them for any purpose at all."[12]

And the latest exposition of the California court upon this subject, is a decision rendered June 7, of the present year, in which the court, in upholding the doctrine of the overruled case of Gould v. Eaton, said: "The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined with-

(9) Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

(10) Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 426.

(11) San Joaquin, etc., Co. v. Fresno, etc., Co., 158 Cal. 626, 112 Pac. Rep. 182.

(12) Porters Bar, etc., Co. v. Beaudry, 15 Cal. App. 751, 115 Pac. Rep. 951.

out a showing of other immediate damages."[13]

Those interested are wondering which side of the question the California court will jump next. But, it is about time that the side of beneficial use had an inning.

Again the rule of beneficial use tends to abrogate the common law doctrine of riparian rights in those States where that doctrine is still enforced. The two rules of laws, the Arid Region Doctrine of appropriation, and the common law doctrine of riparian rights are as opposite in principle as it is impossible to find two rules—the one, that in order to acquire a right to the use of water, it must be actually diverted from the natural stream, and applied to some beneficial use or purpose; and the other, that the water must be permitted to flow by the lands of riparian owners, as it was wont to flow by nature, undiminished in quantity, and undeteriorated in quality. As stated by a California federal judge, for the Circuit Court of Appeals, in an Alaska case: "The common law doctrine of riparian rights being wholly inconsistent with and antagnostic to that of appropriation, it necessarily follows that when the Federal and State governments assented to, recognized and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply."[14]

But, in a California, and a few of the other Western States, this rule has not been followed as the courts have attempted to maintain both systems.

From our personal observation, we are very much in favor of the doctrine of appropriation, as to the use of waters and especially as the doctrine of appropriation has been developed under the more modern codes of State control, and that, too, to the entire abrogation of the common law of riparian rights. Under this rule, the beneficial use of the water form the basis to its right, and as the majority of the Western States have adopted it, its adoption in all, will tend toward greater uniformity of State laws. At the present time, the principal industry in all of the Western States is that of irrigated agriculture. The population of these States is rapidly increasing and in two of the States has more than doubled during the last decade. This increasing population, in turn, requires more of the agricultural products to sustain it. Therefore, the time is rapidly drawing near, when the available water supply will have to be used to its utmost capacity to support the population of these States, to say nothing of raising products for exportation.

Now the question arises as to which of these two systems is the best adapted for the fullest development of irrigated agriculture in this Western country—the system which permits the water to flow by a man's riparian land simply because it enhances the prospect or the system of beneficial use, under which, every drop of the water in the stream may be used for some beneficial use or purpose. Under the former system, the rights to the use of water by riparian owners, are confined to riparian lands, under the latter system, the water may be taken through the riparian lands and made to irrigate lands far from the natural stream. Under the former system the riparian proprietors are so limited and hemmed in by the rules and restrictions of the common law, that they greatly interfere with the use of the water to its fullest capacity, and, therefore, must necessarily interfere with the development of the country. Under the latter rule, every drop of water of the stream may be diverted by the appropriators in the order of their priority, and made to serve the country to its fullest capacity.

The former system originated on an island where there was plenty of precipitation and moisture, and where the question relating to waters was one more of

(13) Shurtleff v. Bracken, — Cal. —, 124 Pac. Rep. 724.

(14) Van Dyke v. Midnight Sun, etc., Co., 177 Fed. Rep. 85, 100 C. C. A. 503.

drainage, that is, how to get the water off the land, rather than how to get it on the land. The common law of riparian rights is in force in England at the present day. But, the greatest argument in favor of the total abrogation of the common law of riparian rights in this Western country, is the fact, that all of the English provinces which occupy territory where irrigated agriculture is necessary, with one exception, have either abrogated entirely common law of riparian rights, or have so limited and restricted these rights, so that they are practically abrogated. In Egypt, India, Australia and Canada, these rights have been abrogated. And the single exception is that of the province of South Africa or Cape of Good Hope, and here trouble and litigation is already being had as the result.

Although the common law was adopted by the constitution and statutes of all the Western States as the rule of jurisprudence where applicable. Under the authorities, this adoption extends only to where such law is applicable to the conditions and circumstances in the particular State. But, in spite of this rule in certain Western States of this country which originally adopted the common laws as the system of jurisprudence of those particular States, by a servile adherence to precedents, the courts have held that the common law principles as to riparian rights were adopted in those jurisdictions, and, that too, regardless of the fact whether or not they were applicable to the physical conditions of those States.

In closing this paper, we will reiterate that in our opinion, the Arid Region Doctrine of appropriation alone, as the same is in force in those States which have also adopted the law of State control, regulating and controlling the appropriation and use of waters within their boundaries, for beneficial purposes, and also administering to the division of those waters as between the respective claimants and where the common law of riparian rights is either entirely abrogated or is limited and restricted to certain specific uses, is the doctrine best applicable, not only to the States, that are entirely arid but also to the semi-arid States as well.

CLESSON S. KINNEY.
Salt Lake City, Utah.

CONTRACT—PUBLIC POLICY

WHITE v. McMATH & JOHNSTON.

Supreme Court of Tennessee. May 10, 1913.

156 S. W. 470.

An agreement by a party wishing to purchase land privately owned, which was not being offered at public sale, or open to competitive bidding on or against any fixed date, to pay another a specified sum in consideration of his relinquishment of his right to purchase the land at a price at which it had been offered to him, was not void as against public policy.

WILLIAMS, J. This suit was brought by McMath & Johnston against White to recover $240, and is before us on petition of certiorari to reverse the judgment of the Court of Civil Appeals, affirming the judgment of the circuit court of Shelby county in favor of plaintiffs in the last-named court.

McMath & Johnston were engaged in the business, in Memphis, of buying and selling real estate, and had entered into negotiations with the owners of a tract of land near Dundee, Miss., and had examined the land and obtained an offer from the owners to sell same to them at $17.50 per acre, and an acceptance was under consideration. White later made an examination of the tract, and endeavored to negotiate with its owners; but, in view of the offer then outstanding to McMath & Johnston, the owners of the land would not sell. White then went to the office of McMath & Johnston in an effort to get them out of the way. At his instance and for his benefit the following contract was entered into:

"For a valuable consideration to me in hand paid by McMath & Johnston, receipt of which I hereby acknowledge, I hereby agree that I will purchase from Trotter & Dreyfus, owners, a certain tract of 480 acres of land near Dundee, Miss., and upon delivery to me by the owners of satisfactory conveyance therefor I will pay said McMath & Johnston the sum of $240.

"It being expressly understood between the parties hereto that said McMath & Johnston have had said land offered to them by the owners at $17.50 per acre, and they are now considering the purchase of said land on their own account. The consideration for the payment of said sum is relinquishment by said McMath & Johnston of their right to purchase said land at said prices, and leaving me, W. C. White, free to conduct negotiations on my own account with said owners. Sale to any one else caused by me, or in my interest, shall be deemed a sale to me. We agree to perform the above contract [Signed] W. C. White. McMath & Johnston, Incorporated, by F. M. McMath, Pres."

The errors assigned disclose two defenses: (1) That the contract is void, because executed for the purpose of preventing competition, and is, therefore, against public policy; (2) that the contract is not supported by a consideration.

(1) The Court of Civil Appeals was divided upon the question whether the contract was invalid because in contravention of public policy, but was unanimous in ruling in affirmance of the circuit court on a distinct point—that since it appeared that White was unable to procure the land at a price lower than $17.50 per acre, and in point of fact paid slightly in excess of that price, no harm to the third party had resulted, and that, therefore, it was not necessary to rule respecting the validity of the contract.

It is manifest that this was an erroneous view. The purpose and tendency of a contract so impeached, and not the specific result of the contract, determine its validity; and it may be invalid, even though in the particular case competition was not in fact stifled and the third party obtained his full price. Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678; Gibbs v. Smith, 115 Mass. 592; Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410; 1 Page, Contracts, 630.

The frustration of the design, if a wrongful one, by the intervention of an act of the third party, can not avail to make it valid or enforceable.

(2) But is the contract one that is to be denounced as thus invalid? No case is cited on the brief of the petitioner's counsel so holding. It is apparent that cases are inapplicable which have reference to contracts involving the stifling of bids at judicial or quasi judicial sales, at sales of state or public lands, or at auction sales, where competition is necessarily focused.

We have here for consideration a contract touching a single tract of land, privately owned, and that was not being offered at public sale or open to competitive bidding on or against any fixed date.

In Shelton v. Sire, 11 Mod. 310, it was said that a person may restrain himself from buying an estate, and that such a restraint is a consideration to support a contract to pay.

In Moore v. First National Bank, 139 Ala. 595, 36 South. 777, it was held that an agreement by a contractor, negotiating privately for the construction of a building, to abandan the negotiations and allow another to obtain the contract, was not contrary to public policy. But had the work been let to competitive bidding, it seems that contrary would have been the ruling. Daily v. Hollis, 27 Tex. Civ. App. 570, 66 S. W. 586.

When a school board fixed the price of property which the school district wished to sell, and then sought a purchaser thereof at that price, making no provision for competitive bidding, a contract of plaintiff to step aside for a consderation and let defendant get a contract therefrom, is not against public policy. Hughes v. Foltz, 142 Mo. App. 513, 127 S. W. 112.

The Supreme Court of West Virginia enforced a contract the consideration for which was the withdrawal of one party from competition in purchasing lands offered for sale otherwise than on competitive biddings. Camden v. Dewing, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797.

The case of Hale v. Henderson, 4 Humph. 199, is to be differentiated on two of its phases. The lands there involved were parts of the public domain, and they were offered at public sale on competitive bids. In the case under consideration, neither of these elements appear.

The power to declare contracts void as against public policy is said to be a delicate and undefined power, only to be exercised in cases settled by recognized precedents and when free from doubt. South Carolina, etc., R. R. v. Railway, 93 Fed. 543, 558, 35 C. C. A. 423; Vidal v. Philadelphia, 2 How. (U. S.) 127, 11 L. Ed. 205. And Mr. Page, in 1 Page on Contracts, § 326, says: "There may be said to be a strong tendency at modern law to restrict the operation of public policy as avoiding contracts to cases under recognized legal principles."

While, as is above indicated, the authorities on the point here under discussion are few in number, they tend to uphold the contract, rather than to denounce it; and we accordingly hold that the views of the majority of the Court of Civil Appeals respecting it were erroneous.

(3) That the contract was supported by a sufficient consideration is held in the cases

above cited. Withholding competition, when not opposed to public policy, is a binding consideration. 6 Am. & Eng. Enc. L. (2d Ed.) 746, and cases there cited; Spitz v. Bank, 8 Lea, 641; Bedford County v. Railroad, 14 Lea, 525.

The result of the decree of the Court of Civil Appeals being a correct one, the writ of certiorari is denied.

NOTE.—*Agreement With Third Person to Withdraw Offer to Purchase at Private Sale.*—The instant case seems to consider that though the purpose of the agreement sued upon was to procure property at a smaller price, yet this was not a fraud in which the parties would be *in pari delicto*. It treats the cases as if the contract must show on its face a presumption of fraud, and therefore sales at public auction stand in a different way. We think actual fraud in barring remedy is as good as any presumption of fraud. We have, because authority on similar state of facts is very scant, gone over cases referred to in the instant case and added a few others.

In Hughes v. Foltz, 142 Mo. App. 513, 127 S. W. 112, decided by Springfield (Mo.), Court of Appeals, referred to in the instant case, the situation was about as stated in the instant case, but additionally it should be stated that the plaintiff had a contract to purchase the property and the school board released the plaintiff from his contract and conveyed the property to defendant promissors. This release was upon the understanding that defendants would take the property at the same price it was to be sold to plaintiff. The board knew of negotiations to get plaintiff out of the way, but the evidence does not show it knew he was being paid to get out of the way. The opinion discusses in no way whatever such a question as was involved in the instant case. It seemed a plain case of one agreeing to purchase stepping aside by consent of the seller and another taking his place.

Camden v. Ewing, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797, also referred to by the instant case seems more appropriate as authority than the Missouri case, *supra*. The facts there show that plaintiff and a firm were engaged in purchasing wild lands in a certain locality, plaintiff holding options from many landowners. Defendants "approached plaintiff and proposed to do away with opposition by letting one party do all the buying of the lands, and they would be able to secure them at a lower figure than otherwise." This agreement was held not to be against public policy. The court said: "The consideration was the withdrawal from competitive bidding, by which they (defendants) were enabled to purchase all the lands cheaper than they might otherwise have done. This was in good faith carried out by the plaintiff. Withholding competition, when not opposed to public policy, is a sufficiently binding consideration. 6 Am. & Eng. Encyc. of Law, 2d Ed., 746." This is all said on the subject, and this may be distinguishable from the instant case on the theory of plaintiff agreeing to cease doing business in a certain locality as a competitive business, a thing different from interfering with a single individual's market, especially as no stress was laid upon the fact of there being options already obtained. This fact, if important, was overlooked. It does not appear, either, that wild landowners were offering their lands, but they were being sought and there was a business of seeking them out. From this *business* plaintiff agreed to retire.

In Moore v. First Natl. Bank, 139 Ala. 595, 36 So. 777, it is stated that: "The withholding, by agreement, of competition in business, though the business involve but a single transaction, is, when not opposed to public policy, a valuable consideration on which to rest the agreement. 6 Am. & Eng. Encyc. Law, 746; McCulloch v. Cowper, 5 Watts & Serg. 427; Pierce v. Fuller, 8 Mass. 222; Heim v. Butin, (Cal.), 40 Pac. 39. The public had no concern in the letting of the contract for the mill building, and, therefore, no interest in maintaining competition." This is very pertinent support to the instant case, but why it is allowable to cut off an individual's right to competition when the public's cannot be is hard to see. The public's market and the individual's ought to be the same.

In Daily v. Hollis, 27 Tex. Civ. App. 570, 66 S. W. 586, cited by instant case, refers to letting a contract upon competitive bids, but the work to be done was for a private corporation and the contract was condemned because it "was to obtain an unfair advantage and the means employed were calculated to accomplish that purpose. The improper motive underlying the agreement and the method adopted of carrying it into effect stamp it as essentially vicious." It was also said: "It was useless to speculate whether the (letting) company was actually damaged."

In Citizens' Bank v. Mitchell, Okla., 103 Pac. 720, an agreement relating to the letting of public work by competitive bidding was deemed illegal for the double reason that it tended to lessen competition and to operate a fraud.

In Boyle v. Adams, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96, was where a state commissioner offered for sale its pine lands and plaintiff offered to purchase same at private sale, which offer the commissioner was holding under consideration. Defendant agreed to pay plaintiff $500 to withdraw his offer. The court said: "It is rather difficult to spell out of this any sufficient consideration for the promise to pay this money; but, if there is, it must be because the agreement removed competition in the way of offers or proposals for the purchase of public property offered for sale and thus enabled the defendant to buy it for a less price than he otherwise could have done. If so, the agreement was one that operated against the interests of the public and was therefore void as against public policy. If the sale had been at public auction and a like agreement had been made to buy off and prevent competition, there could have been no doubt of its illegality. But the fact that the sale was private can make no difference in a case like the present." How much more interest has the public in protecting the interests of the public than it has in seeing that a private citizen is not defrauded by an agreement of this kind? It is public policy to condemn this kind of contract in either case. It is the evil tendency, not the result, of which the law takes notice.

In Morrison v. Darling, 47 Vt. 67, the same distinction is drawn as in the instant case, between sales at public auction and a private sale,

the owner at the latter being under no obligation to sell to anyone, and it was said "there was no stipulation to resort to any illegal or improper means to mislead the owner, or to induce a sale by any fraud or artifice."

In Hyer v. Richmond Transaction Co., 168 U. S. 471, the above language was quoted and it was said: "But, as observed, every case must depend on its own circumstances," meaning if conduct is open and the situation understood by the owner of property at private sale there is nothing objectionable.

We think it may be said that the only difference in such a contract as the instant case shows and one where property is to be sold at public auction, is the presumption of fraud is so strong in the latter case that the contract is judicially declared to be against public policy. But fraud is the reason and, if by such a contract as in the instant case it is intended to overreach an owner, the law should pronounce the contract void. It seems to us, also, that it ought not to take much to prove fraud in such a case. The distinction drawn in the Boyle case, *supra*, reasonably should be deemed to embrace a private owner. Suppose, for example, an owner should advertise that he was offering to sell at private sale for a certain time and if not sold he would dispose of land at public auction. Would it be allowable to buy off a prospective purchaser? This is about the effect of an order of court allowing a receiver to offer at private sale. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF ILLINOIS STATE BAR ASSOCIATION.

The thirty-seventh annual meeting of the Illinois State Bar Association was held at Springfield, Illinois, on Tuesday and Wednesday, April 8th and 9th, 1913. The president's address was delivered by Judge Harry Higbee, of Pittsfield. The president referred to the public demand for reforms in court proceedings and pointed out certain changes in the law which would make the administration of justice more simple, more speedy and more certain. The report of the secretary was made by John F. Voigt, of Mattoon. In it he reviewed in a general way not only the work of the Illinois State Bar Association, but also the activities of the Bar Associations of the various states of the union. Practically all of them are engaged in the discussion of reforms in procedure and practice.

The first day of the meeting was devoted to the discussion of the general principles in reform best adapted to the needs of Illinois courts. This discussion was opened by Edgar B. Tolman, of Chicago, chairman of the committee on law reform. This report followed in a general way the recommendations of a similar committee of the American Bar Association. The outstanding recommendations of the report were that the rules of procedure should be made by the Supreme Court for the entire state, and that only general principles should be enacted into law by the legislature. This would make the procedure more flexible and more easily amended when experience shows where improvements can be made. Twenty-five lawyers representing the various districts of Illinois participated for ten minutes each in this discussion. The report of the committee on law reform, which represented the work of that committee for three or four years, was unanimously adopted by the Association and a committee appointed to endeavor to secure the enactment of the recommendations of this committee into law.

The annual address of the Association was delivered by Prof. Wm. E. Higgins of Lawrence, Kans., who was a member of the committee that wrote the new code of civil procedure for the state of Kansas, a code of procedure that is said by those who are familiar with it to be a model of simplicity and a distinct advance in this line of law.

The report of the committee on uniform state laws was made by Albert D. Early of Rockford. It reviewed this subject and stated briefly the states that have adopted uniform laws of various kinds. E. P. Williams of Galesburg, read the report of the committee on legal history and biography. Dean Oliver A. Harker of Urbana, made the report for the committee on legal education. It takes firm ground for a more thorough education before beginning both the study and the practice of law. The exceedingly interesting meeting of the American Bar Association held at Milwaukee, in 1912, was reviewed by William R. Curran, of Pekin.

Herbert Harley of Manistee, Michigan, read an address on the court of Ontario. He showed that Ontario, a close neighbor of this country has a much simpler practice in its courts than we have, and pointed out how we could benefit in a very large measure by a study of the procedure in Canadian courts.

Albert M. Kales, of Chicago, delivered an address on the English Judicature Act. He urged the adoption of many of its principles by the Bar of Illinois. It has been in force in England almost forty years and is believed to be one of the best systems known for conducting proceedings in courts.

The meeting closed with a reception and

banquet at which the speakers were: Governor Edward F. Dunne, Chief Justice of the Supreme Court, Frank K. Dunne, William McKinley, speaker of the House of Representatives, former Lieutenant Governor, William A. Northcott, and Edgar B. Tolman of the Chicago Bar.

The new officers of the Illinois State Bar Association are Robert McMurdy, President, Chicago; John F. Voigt, Secretary-Treasurer, Mattoon.

CORRESPONDENCE.

DOES "LABOR" COME WITHIN THE MEANING OF THE SHERMAN ACT.

Editor Central Law Journal:

Recent statements in the public press show the sworn and veteran enemies of Organized Labor are waxing hot and obstreperous over the bill recently passed by Congress, providing that none of the moneys appropriated by Congress for the enforcement of the Federal anti-trust act shall be used against Organized Labor.

When the anti-trust act was on its passage through Congress, it was the prevailing sentiment, both in the House and Senate, openly expressed that the law-makers had no intention of applying its provision to organized labor.

Its application to organized labor was an act of pure legislation on the part of the Federal judiciary, and was a great surprise to the overwhelming majority of the legal profession.

If men are really and naturally free, as the Declaration of Independence says they are, then the matter of the withholding and bestowal of their labor is their absolute, unqualified right, and is beyond the reach of the courts, except where questions of damage for breach of contract to labor may arise.

Hence, a combination by two or more of them to withhold their labor, is merely a conspiracy to do a lawful thing, and courts of last resort have already decided that there can be no such thing as an unlawful conspiracy to do a lawful act. Lindsay vs. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127, 127 Am. St. Rep. 722.

Labor is primarily a psychological process, depends primarily upon an exercise of the will, and only secondarily develops into a material fact.

The Federal anti-trust act was aimed against monopoly, and monopoly applies only to commodities, and commodities mean only inanimate things, goods, wares and merchandise. When men were slaves, they were treated as chattels, commodities, goods, wares and merchandise.

The term "commodity" can never, without violating law, logic and sound sense, apply to free human beings.

Neither Congress, nor the courts can lawfully degrade free men into goods, wares and merchandise.

CORNELIUS H. FAUNTLEROY.

St. Louis.

BOOK REVIEWS.

TIFFANY ON DEATH BY WRONGFUL ACT.

The first edition of this work appeared in 1893, and as the author points out: "In the nineteen years that have elapsed many changes in the statutes have been made and many decisions upon questions that were then unsettled have been rendered."

The first edition of this work had a well-deserved popularity and this enlargement greatly enhances its utility. There is especially an abundance of decisions respecting the statutes which give the right of action the author is considering, which, and the appendix showing what these statutes are, beginning with the Lord Campbell Act and those in the states, is valuable. The book is gotten up in attractive style and finish, bound in law buckram and published by Vernon Law Book Company, Kansas City, Mo., 1912.

HUMOR OF THE LAW.

At a social party, where humorous definitions formed one of the games of the evening, the question was put: "What is religion?" "Religion," replied one of the party, who was less renowned for piety than anything else, "religion is an insurance against fire in the next world, for which honesty is the best policy."

A fire insurance agent tells this one:

'We have some funny experiences in our business. One day a small merchant of the hill section came to me and insured his stock of ready-made clothing for $3,500. He was going out with the policy when I reminded him that he had forgotten to pay the premium.

"'How much is it?' inquired my customer.

"'Oh, just a little matter of $24.'

"'Well,' said he, 'suppose you just let the premium stand and deduct it when the store burns down.' "—Exchange.

In some cases counsel receive answers to questions that they had no business to put, which, if not quite to their liking, are what they justly deserve. The following story of George Clarke, a celebrated negro minstrel, is a case in point. On one occasion, when being examined as a witness, he was severely interrogated by a lawyer.

"You are in the minstrel business, I believe?" inquired the lawyer.

"Yes, sir," was the reply.

"Is not that rather a low calling?"

"I don't know but what it is, sir," replied the minstrel, "but it is so much better than my father's that I am rather proud of it."

"What was your father's calling?" he inquired.

"He was a lawyer," replied Clarke, in a tone that sent the whole court into a roar of laughter as the discomoted lawyer sat down.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Arson**—Burden of Proof.—Mere proof that a barn was consumed by fire does not tend to show that the fire was a felonious one; the presumption being that it was accidental.—Moon v. State, Ga., 77 S. E. 1088.

2. **Attachment**—Debt.—It is not necessary in order that plaintiff may have an attachment that the damages should be capable of definite estimation.—Cain v. Perfect, Kan., 131 Pac. 573.

3. **Bailment**—Replevin.—That a person intrusted with the custody of an automobile obtained a loan for the use of the owner and deposited the same as indemnity in a replevin suit in the name of the owner to prevent the automobile from being sold on execution against the bailee was not inconsistent with his status as bailee to the owner.—Warren v. Finn, N. J., 86 Atl. 530.

4. **Bankruptcy**—Deceit.—Proof of a claim in bankruptcy as upon a contract, and participation in composition proceedings, is not a bar to action for deceit in obtaining credit by false reports to a commercial agency.—Friend v. Talcott, 33 Sup. Ct. Rep. 505.

5.——Jurisdiction.—Physical possession of a crop, first by the bankrupts and later by the trustee, brought the property within the exclusive jurisdiction of the bankruptcy court as assets of the estate.—Hebert v. Crawford, 33 Sup. Ct. Rep. 484.

6.——Practice.—A voluntary intervention in bankruptcy proceedings to assert a claim to property in possession of the trustee is reviewable by appeal to the Circuit Court of Appeals.—Houghton v. Burden, 33 Sup. Ct. Rep. 491.

7.——Preference.—Where a bankrupt corporation, while insolvent, made payments on notes indorsed for its accommodation by the mother of its secretary and treasurer, the effect of which was to relieve her from liability as indorser, they constituted preferences recoverable by the bankrupt's trustee.—Platt v. Ives, Conn., 86 Atl. 579.

8. **Banks and Banking**—Collection.—Where a collection item was sent to a trust company having many branches, and a receiver was appointed on its insolvency after the item had been collected, but before the proceeds had been remitted, and an amount of cash more than sufficient to pay it passed into the hands of the receiver, the claimant was entitled to a preferred claim, though the money in the branch collecting the claim, which passed to the receiver, was insufficient for that purpose.—First Nat. Bank v. Union Trust Co., Tex., 155 S. W. 989.

9.——Depositor.—Where a check, drawn by a depositor on his bank and indorsed in blank, is transferred to another bank, which is insolvent, and advances are made thereon in good faith, the depositor must stand the loss.—Plumas County Bank v. Bank of Rideout, Smith & Co., Cal., 131 Pac. 360.

10.——Dishonoring Check.—Where a bank wrongfully protests a depositor's check, it is not liable for exemplary damages, unless guilty of fraud, malice, gross negligence, or oppression in so doing.—Winkler v. Citizens' State Bank of Gueda Springs, Kan., 131 Pac. 597.

11. **Bills and Notes**—Indorser.—One who indorsed a note payable to the maker's order before the maker indorsed or negotiated it cannot escape liability under section 320, providing that where a note is drawn to the maker's own order it is not complete until indorsed.—Yonkers Nat. Bank v. Mitchell, 141 N. Y. Supp. 128.

12.——Negotiability.—Reservation in mortgage of an option to pay before maturity held not to destroy the negotiability of the note secured.—Fisher v. O'Hanlon, Neb., 141 N. W. 157.

13. **Bonds**—Construction.—Though the bond of M. and wife to support J. and wife, given at about the time J. and wife, in consideration of support, conveyed their farm to M., their son, and his wife, names no payee or obligee, the obligation must be to those named who are to be benefited, so that they can sue thereon.—Martin v. Martin, N. C., 77 S. E. 1104.

14. **Brokers**—Revocation.—An agency to sell real estate and receive the proceeds above a certain amount as commission is not a power coupled with an interest, precluding revocation of the agency.—Chase v. Chapman, Kan., 131 Pac. 615.

15. **Carriers of Goods**—Common Carrier.—A railway company transporting at reduced rates men and supplies required by construction company in grading an extension is not acting as a common carrier.—Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 33 Sup. Ct. Rep. 474.

16.——Connecting Carrier.—Where a connecting carrier delivered a car on a track owned jointly with defendant, and informed defendant's agent that it had no charges against the car, it was defendant's duty to reship the same

in accordance with orders from the owner, and its refusal to do so by reason of the connecting carrier's subsequent objection rendered defendant a joint tort-feasor and liable for damages from the delay.—Gulf, C. & S. F. Ry. Co. v. Lowery, Tex., 155 S. W. 992.

17. **Carriers of Passengers**—Care.—Where an insane person boarded a train without a caretaker, it was the carrier's duty to exercise a high degree of care for his safety and to restrain him, if necessary, to prevent him leaving the train.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex., 155 S. W. 1003.

18.——Contributory Negligence.—Whether a boy 14 years old was at fault in jumping from a moving train depended on whether the ordinary boy of his age and experience and with his knowledge of the situation and its dangers would have done what he did.—Kambour v. Boston & M. R. R., N. H., 86 Atl. 624.

19.——Payment of Fare.—While a passenger may refuse to pay fare unless he is provided with a seat, he is not entitled to ride free; and, if no seat is provided, he must leave the train at the first opportunity, or he will be subject to ejection.—Cave v. Seaboard Air Line Ry., S. C., 77 S. E. 1017.

20.——Stations.—The obligation of a railroad to use ordinary care to light its stations and approaches obtains while passengers sustain the relation of passengers, such as when leaving the train for refreshment, for the sending of telegrams, and the like.—Texas & P. R. Co. v. Stewart, **33 Sup. Ct. Rep. 548.**

21. **Charities**—Pious Use.—A "mass" is an act of public worship in celebration of the Eucharist as observed in the Roman Catholic Church, and, being public to all, is a "religious and pious use," so that a gift for public masses "for the repose of all poor souls" is a "public charity" as distinguished from a "private charity," which it might be if restricted to masses for the souls of designated persons.—Ackerman v. Fichter, Ind., 101 N. E. 493.

22. **Commerce**—Employe.—Where a motorman engaged in interstate commerce was killed by derailment of his car, proof of a defect in the wheels, though sufficient to establish a prima facie case of negligence under an Ohio statute, was insufficient; the case being governed by the federal Employer's Liability Act, requiring proof of negligence.—South Covington & C. St. Ry. Co. v. Finan's Adm'x, Ky., 155 S. W. 742.

23.——Employe.—A member of a switching crew, engaged in moving oil from an oil car to provide fuel for engines used in interstate commerce, is within the protection of the federal Employer's Liability Act.—Montgomery v. Southern Pac. Co., Ore., 131 Pac. 507.

24. **Constitutional Law**—Probate Court.—There is no infirmity under Const. U. S. Amend. 14, in a personal judgment for a devastavit rendered by the probate court according to local practice in favor of an administrator de bonis non, against the executor who has removed to another jurisdiction and has been adjudged incompetent, where the steps were taken were concurred in by the court that controlled the cause and the court had control of his person.—Michigan Trust Co. v. Ferry, **33 Sup. Ct. Rep. 550.**

25. **Contracts**—Consideration.—Transfer of corporate stock by the husband of testator's daughter, to the daughter, in accordance with a promise to testator, held a sufficient consideration for the testator's promise that he would satisfy or return to the daughter a mortgage given to him by her.—In re Percival's Estate, **141 N. Y. Supp. 180.**

26.——Consideration.—Agreement to employ plaintiff for life in consideration of release of claim for damages held not nonenforceable because optional on plaintiff's part as to how long he would remain in the employment, where he worked thereunder without interruption until discharged.—Texas Cent. R. Co. v. Eldridge, Tex., 155 S. W. 1010.

27.——Construction.—A contract should be construed against the party on whom rests the obligation involved.—Loeb v. City of Montgomery, Ala., 61 So. 642.

28.——Repugnancy.—Where two clauses of an agreement are repugnant and cannot stand together, the first will stand and the second be rejected.—Pittsburg & S. R. Co. v. Central Trust Co. of New York, 141 N. Y. Supp. 66.

29.——Restraint of Trade.—A provision of a contract by which a physician employed an assistant that, upon the termination of the employment the assistant would not engage in the practice of his profession in the same town was valid.—Styles v. Lyon, Conn., 86 Atl. 564.

30.——Sunday.—A Sunday contract is contra bonos mores and unenforceable, but, when fully executed, the courts will not interfere and relieve the complaining party.—McKee v. Verner, Pa. **86 Atl. 646.**

31.—**Corporations**—Equity.—A court of equity will enjoin the trustees of a corporation from selling its property, where it appears that a fraud is contemplated, or about to be perpetrated, on the stockholders.—Bergman Clay Mfg. Co. v. Bergman, Wash., 131 Pac. 485.

32.——Foreign Corporation.—Stockholders and creditors of a foreign corporation, which has its business office in the state, may sue resident officers of the corporation to recover, on behalf of the corporation, moneys converted by the officers and lost by their fraudulent and negligent conduct.—Ganzer v. Rosenfeld, Wis., 141 N. W. 121.

33.—Subscription.—A subscription contract for the total stock of a corporation may be canceled by unanimous consent of the subscribers, provided rights of creditors are not involved.—National Realty Co. v. Neilson, Wash., 131 Pac. 446.

34.——Trust.—A director and manager of a corporation who acquired the stock by means of fraudulent representations to the shareholders as to its value is guilty of a breach of trust.—Black v. Simpson, S. C., 77 S. E. 1023.

35. **Courts**—Practice.—Question passed upon by the Circuit Court of Appeals will be considered in the federal Supreme Court on writ of certiorari, though not raised in the trial court.—Friend v. Talcott, 33 Sup. Ct. Rep. 505.

36. **Covenants**—Building Restrictions. — A covenant that a flat or apartment house should

not be erected on the conveyed premises, and that there should not be more than one residence thereon, was breached by the erection of a double house suitable for the occupancy of two families, though the exterior of the house was such as to make it appear that it was a single house.—Kenwood Land Co. v. Hancock Inv. Co., Mo., 155 S. W. 861.

37.——Restraint of Trade—One may lawfully covenant to refrain from pursuing a particular business within certain territory, even if it be an entire state, if the restraint thereby established is reasonable and affords only fair protection to the one for whose benefit it is imposed.—Barrows v. McMurty Mfg. Co., Colo., 131 Pac. 430.

38. **Criminal Law**—Confession.—The declarant's surroundings may be more ominous and more potential than threats in inducing the confession and rendering it inadmissable as evidence.—Moon v. State, Ga., 77 S. E 1088.

39.——Silence.—Where the state claimed that accused walked into a room where decedent was, and immediately shot him, while accused testified to a struggle between himself and decedent, the testimony of a witness that she immediately after the shooting asked why he shot decedent, and that he made no response, was admissible.—McKelvey v. State, Tex., 155 S. W. 932.

40.——Withdrawing Plea.—Where the trial judge accepted a plea of guilty, knowing that the state's counsel had represented that the punishment would be as for a misdemeanor, and defendant immediately upon being sentenced as for a felony moved to withdraw his plea, the motion should have been granted, though the state's counsel had no authority to bind the judge.—Griffin v. State, Ga., 77 S. E. 1080.

41. **Deeds**—Description.—Where a description by metes and bounds does not cover a strip in question, but it appears from words following such description that the whole strip was intended to be conveyed, the intended conveyance will prevail.—Weinheimer v. Ross, 141 N. Y. Supp. 55.

42.——Re-entry.—Where a right of forfeiture is expressly reserved in a deed, but a right of re-entry is not, the right of re-entry will be implied.—Smith v. Eagle Coal & Mercantile Co., Mo., 155 S. W. 886.

43. **Divorce**—Connivance.—"Connivance" is one spouse's consent, express or implied, to the misconduct of the other; but a mere passive permission of misconduct in order to test fidelity is not connivance.—Herriford v. Herriford, Mo., 155 S. W. 855.

44.——Counsel Fees.—Allowance of counsel fees to wife's counsel held to be denied where pending the appeal the suit had abated by the wife's death, although the right to apply for such counsel fees had been expressly reserved at the time of a prior application.—Seibert v. Seibert, N. J., 86 Atl. 535.

45. **Dower**—Favored.—Dower is favored in the law and is awarded in case of doubt.—Donaldson v. Donaldson, Mo., 155 S. W. 791.

46. **Electricity**—Confiscatory Rates.—Where an electric light company has been forced to furnish light at 12 cents per kilowatt hour, it cannot contend that the rate is confiscatory simply because there is a loss on subscribers who consume less than one dollar's worth; the company not being entitled to a profit on each consumer, but only on its entire business.—Jacobs v. Water Light & Transit Co. of Carrollton, Mo., 155 S. W. 826.

47. **Embezzlement**—Intent.—To constitute larceny after trust, there must be a specific intent to fraudently convert the property to the bailee's use, or otherwise fraudulently dispose of it, with intent to defraud the bailor; culpable negligence not being an ingredient of such crime.—Rucker v. State, Ga., 77 S. E. 1129.

48. **Escheat**—Alien.—Where an alien died intestate, seized of land, it immediately vested in the state by escheat at common law.—Donaldson v. State, Ind., 101 N. E. 485.

49. Estates.—Perpetual Lease.—A "perpetual lease" is the substantial equivalent of a fee reserving rent, and creates a defeasible fee.—Penrick v. Atkinson, Ga., 77 S. E. 1055.

50. **Executors and Administrators**—Real Estate.—An executor holds the rents and profits of land specifically devised, subject, if necessary, to subjection to the payment of debt and expenses of administration.—In re De Bernal's Estate, Cal., 131 Pac. 375.

51.——Statute of Limitations.—A regular administrator must plead the statute of limitations against any barred claim, and he may not pay a claim that is barred by limitations.—Jackson v. Stone, Tex., 155 S. W. 960.

52. **Exemptions**—Attachment.—Where an attachment creditor counseled the sheriff to refuse the debtor's demand for an appraisal of the property to set off exemptions, he became a joint tort-feasor with the sheriff, and a demand was not necessary as condition precedent to an action for damages—Millerke v. Riley, S. D., 141 N. W. 136.

53. **Fixtures**—Lien.—No agreement between lessor and lessee as to the removal of machinery after the lease expired would affect the character of such machinery as a fixture or otherwise with reference to the rights of third persons claiming a lien thereon as realty.—Horn v. Clark Hardware Co., Colo., 131 Pac. 405.

54. **Frauds, Statute of**—Original Promise.—An agreement made in forming a partnership, as a part of the consideration thereof, to assume the debts of one of the partners was an original obligation, and hence not required to be in writing by the statute of frauds.—Stover v. Stevens, Cal., 131 Pac. 332.

55.——Original Promise.—Where the purchaser owes the seller the price under a written contract, a verbal direction from the seller to pay a part of it, when due, to third persons, is an original undertaking and does not contradict the contract for the sale of the land required by the statute to be in writing.—Foster v. Hoff, Okla., 131 Pac. 531.

56.——Part Performance.—The taking of possession of premises under a parol agreement to convey, accompanied by payment of the full price, is such a part performance as to take the case out of the statute of frauds.—Brown v. Pinniger, N. J., 86 Atl. 541.

57. **Gaming**—Future Deliveries.—Where the parties to a contract to sell cotton at a fixed price contemplate the actual delivery of the cotton, the contract is not a gambling contract, though it provides that it may be settled by a money payment upon failure to deliver actual cotton.—Daniel v. Reeves, Ga., 77 S. E. 1067.

58. **Garnishment**—Garnishable Debt.—Where the buyer agrees to pay the price to a third person who claims a lien under a chattel mortgage, the purchase money while in the buyer's hands is not subject to garnishment by another creditor of the seller, though the chattel mortgage is not in fact a lien upon the property; but the purchase money will be applied as agreed.—Mason v. Sanders, Kan., 131 Pac. 562.

59. **Good Will**—Continuing Business.—Good will has no meaning, except in connection with a continuing business.—Kaufmann v. Kaufmann, Pa., 86 Atl. 634.

60.——Defined.—The good will of a business is the probability that customers will resort to the old place for the purpose of trade.—Sivley v. Cramer, Miss., 61 So. 653.

61. **Highways**—Tidal Land.—Where a highway is laid out across mud flats over which the tide ebbs and flows, the occupancy of the soil for a highway deprives the owner of his right of reclamation, and there is no presumption that the abutting owner owns to the center of the highway.—Town of Norwalk v. Podmore, Conn., 86 Atl. 582.

62. **Homestead**—Head of Family.—The husband has the right to choose the homestead for the family and to abandon a homestead.—White v. Cowles, Tex., 155 S. W. 982.

63. **Homicide**—Communicated Threats.—Where accused, relying on self-defense, had been informed of the fact that his life had been threatened by decedent and he acted on that information when firing the fatal shot, the jury must view the case from his standpoint, and not from the standpoint as to whether the threats were or were not made.—Robbins v. State, Tex., 155 S. W. 936.

64.——Manslaughter.—Sudden passion aroused by a belief that accused's wife was committing adultery reduces the crime to manslaughter only where accused had ocular evidence of facts justifying a reasonable belief that it was actually being committed; a mere belief that his wife was about to commit the offense not being sufficient.—State v. Saxon, Conn., 86 Atl. 590.

65.——Self-Defense.—Though proof that deceased was a violent and dangerous man must ordinarily be shown by general reputation, yet, if self-defense is in issue, specific acts communicated to defendant before the difficulty may be proved.—Hysaw v. State, Tex., 155 S. W. 941.

66. **Husband and Wife**—Antenuptial Contract.—A husband has the burden of showing that an antenuptial contract was fairly entered into and is just and adequate.—Donaldson v. Donaldson, Mo., 155 S. W. 791.

67.——Community Property.—The authority of the surviving spouse to sell the interest of the deceased spouse in the community property to pay community debts is restricted to the payment of enforceable community debts.—Jackson v. Stone, Tex., 155 S. W. 960.

68.——Support and Maintenance.—The husband's duty to properly maintain and support his wife is conditioned upon her being ready and willing to perform the duties she owes to her husband, to live with him and make a home for him.—Sturm v. Sturm, 141 N. Y. Supp. 61.

69. **Injunction**—Ordinance.—Injunction lies to test the validity of police regulations and ordinances governing hackmen while at a passenger depot in a city; the remedy by submission to arrest and suing for damages being inadequate.—City Cab, Carriage & Transfer Co. v. Hayden, Wash., 131 Pac. 472.

70. **Insurance**—Agent.—The soliciting agent of an insurance company had no implied authority to make any representations for the company with respect to loans to be made by it.—Burns & Reilly Real Estate Co. v. Philadelphia Life Ins. Co., Pa., 86 Atl. 642.

71.——Insurable Interest.—One who has contracted to furnish the materials and erect a building has an insurable interest in the building, irrespective of payments made to him by the owner.—Sammons v. American Home Fire Ins. Co., S. C., 77 S. E. 1108.

72.——Mortgagee.—An insurance policy making the loss payable to a mortgagee, as his interest appears, insures the owner's, and not the mortgagee's, interest, and the latter's interest depends upon the breach or performance of the contract by the owner.—Rawl v. American Cent. Ins. Co., S. C., 77 S. E. 1013.

73.——Vacancies.—A policy of fire insurance in the standard form permits occasional or incidental vacancies for less than ten days.—Tracy v. Queen City Fire Ins. Co., La., 61 So. 687.

74. **Judgment**—Set-Off.—A debt not in judgment cannot be set off against a judgment, whether entered by confession or obtained by adverse process.—McKee v. Verner, Pa., 86 Atl. 646.

75.——Tortfeasors.—While, in a tort action, plaintiff is entitled to judgment against all defendants found guilty for the largest amount found against any one of them, he is not entitled to compensatory damages against some of the parties and punitive damages against others.—Young v. Aylesworth, R. I., 86 Atl. 555.

76. **Landlord and Tenant**—Entry.—A landlord's right of entry for nonpayment of rent reserved in the lease can be exercised before the termination of the lease by lapse of time only after notice.—Stevenson Bros. Co. v. Robertson, Cal., 131 Pac. 326.

77.——Lease.—That a contract is termed a lease by the parties and in the contract itself does not establish its character, which is determined from its terms and conditions.—State v. Hall, N. D., 141 N. W. 124.

78. **Limitation of Actions**—New Promise.—The discharge of a barred debt is a sufficient consideration for a new promise.—Jackson v. Stone, Tex., 155 S. W. 960.

79. **Malicious Prosecution**—Malice.—The malice essential to a right of action for malicious prosecution is not restricted to the personal hatred, spite, or revenge of the one who instituted the prosecution.—Foltz v. Buck, Kan., 131 Pac. 587.

80. **Master and Servant**—Labor Union.—A labor union having a label may withhold the label from those who do not comply with the conditions it attaches to its use, but it may not employ its label for an unlawful purpose or as an unlawful means; and members of the union may not justify their conduct, causing the discharge from employment of a nonunion laborer, by the fact of ownership by the union of a label.—Connors v. Connolly, Conn., 86 Atl. 600.

81.——Master's Assurance.—Where the employer's foreman assures the employee, upon his making complaint, that he is in a safe place to work, and commands him to proceed with the work, the responsibility for resulting injuries is on the employer.—Massee & Felton Lumber Co. v. Ivey, Ga., 77 S. E. 1130.

82.——Protection.—Where it was the habit of employees to assist in carrying on whatever work was to be done at the time, irrespective of any particular orders, an employee standing idly by for a moment, waiting to go to work when necessary, was entitled to protection as an employee.—Warren v. Townley Mfg. Co., Mo., 155 S. W. 850.

83. **Monopolies**—Anti-Trust ....Statute.—The anti-trust statute includes within its provisions only those contracts in restraint of trade which were held by the common law to be invalid as against public policy.—Sivley v. Cramer, Miss., 61 So. 653.

84. **Mortgages**—Foreclosure.—A mortgage foreclosure and sale in a suit brought by the mortgagee and defended by the administrator of the mortgagor did not devest the title of the mortgagor's non-resident heir.—Phillips v. Tompson, Wash., 131 Pac. 461.

85. **Negligence**—Evidence.—Where plaintiff claimed to have fallen on a defective stair in an apartment building, evidence that the janitor was observed making repairs on the stairs 24 hours after the accident was inadmissible.—Causa v. Kenny, 141 N. Y. Supp. 98.

86. **Partnership**—Agency.—One partner may bind the firm under seal to a lease without written authority from the other partners.—Fincher & Womble v. Hanson, Ga., 77 S. E. 1068.

87.——Agency.—A ratification by one partner of the unauthorized act of his co-partner in guaranteeing in the firm name payment of the note of a third person is equivalent to antecedent authority.—Garden City Nat. Bank v. Schulman, Kan., 131 Pac. 559.

88. **Principal and Agent**—Implied Authority.—The implied authority of a general agent, managing a business, depends upon the nature of such business, and, as a general rule, he has power to do those things which are necessary and proper to be done in carrying out the business in the usual and accustomed way.—Butts v. Ajax-Grieb Rubber Co., Mo., 155 S. W. 837.

89.——Notice.—One knowing the circumscribed authority of the agent and that his act transcends his powers cannot hold the principal.—Slocum v. New York Life Ins. Co., 33 Sup. Ct. Rep. 523.

90.——Power of Attorney.—Where a power of attorney authorizing sale or mortgage of real property is unlimited as to time, it must be exercised within a reasonable time, and a sale made after more than 10 years had expired is too late.—Marquam v. Ray, Ore., 131 Pac. 523.

91. **Principal and Surety**—Interest.—A surety is liable only to the extent of the penalty of the bond, but interest may be allowed from the time of default, though the judgment may then exceed the penalty.—Empire State Surety Co. v. Lindenmeier, Colo., 131 Pac. 437.

92.——Surety Company.—The law does not have the same solicitude for incorporated surety companies as it has for voluntary sureties, and, such corporations being essentially insurers, the rules peculiar to suretyship do not apply.—Chicago Lumber Co. v. Douglas, Kan., 131 Pac. 563.

93. **Railroads**—Crossings.—The rights of a railroad company at a public crossing and of a person lawfully using the highway are equal, except as to the company's prior right to use the crossing upon giving due notice by signals, etc.—Virgin v. Lake Erie & W. R. Co., Ind., 101 N. E. 500.

94.——Negligence Per Se.—The running of a train through a town in violation of its speed ordinance or of the statute constitutes negligence per se.—Cleveland, C., C. & St. L. Ry. Co. v. Pace, Ind., 101 N. E. 479.

95. **Removal of Causes**—Remand.—The remanding by a federal Circuit Court of a suit against a firm to a state court whence it had been removed for diversity of citizenship held ordered on the ground that, as under the local practice the firm had been sued as an entity without joining individual partners, there was no diversity of citizenship.—McLaughlin Bros. v. Hallowell, 33 Sup. Ct. Rep. 465.

96. **Sales**—Contract—That a contract was designated a "sale" did not make it such, where it was apparent that the parties were making a lease.—Long v. Sun Co., La., 61 So. 684.

97.——Contract.—A contract for the sale of a drug store, including the stock and business, is not unenforceable because the business had been conducted in violation of law, requiring the owner or an employee to be a pharmacist.—Swisher v. Dunn, Kan., 131 Pac. 571.

98.——Express Warranty.—No precise form of expression is required to create an "express warranty, any affirmation of the quality of the thing sold, made to assure the buyer and induce him to purchase, being sufficient if relied on."—White Automobile Co. v. Dorsey, Md., 86 Atl. 617.

99.——Rejection.—A buyer of goods may, within a reasonable time, reject them if they do not comply with the contract requirements and so entirely defeat the seller's right of recovery therefor.—Monarch Metal Weather Strip Co. v. Hanick, Mo., 155 S. W. 858.

100. **Specific Performance**—Personal Skill.—As a rule, specific performance of contracts continuous in their nature or involving skill, personal labor, or cultivated judgment will not be decreed, nor when the court has not the appropriate means to render or enforce a decree of performance.—Houston Electric Co. v. Glen Park Co., Tex., 155 S. W. 965.

101. **Tender**—Conditional.—Where a larger sum than that tendered is in good faith claimed to be due, the tender is ineffectual if its acceptance involves the admission that no more is due.—Smith v. School Dist. No. 64, of Marion County, Kan., 131 Pac. 557.

102. **Vendor and Purchaser**—Notice.—A purchaser from a bona fide purchaser for a valuable consideration is protected by that purchase, regardless of the fact that he knew of an adverse claim under a prior deed.—Long v. Shelton, Tex., 155 S. W. 945.

103. **Warehouseman**—Directions.—Where a storage and forwarding company did not follow plaintiff's directions as to the shipment of his household goods, either as to the kind of car or carrier, it was liable for any damages occurring in the unauthorized shipment.—Security Storage & Trust Co. v. Denys, Md., 86 Atl. 613.

104. **Waters and Water Courses**—Definition.—It is not essential to a "water course" that the bed or channel show at all points a worn surface or broken turf, or that the banks form prominent landmarks; the distinguishing feature being a permanent supply in that similar conditions always produce a flow of water and that such conditions recur with some regularity so as to establish a running stream for considerable periods of time.—Thompson v. New Haven Water Co., Conn., 86 Atl. 585.

105. **Wills**—Contest.—In a will contest, proponents make a prima facie case by introducing the subscribing witnesses, and proving due execution, and that testator was of sound mind, and read the will.—Hall v. Hall, Ky., 155 S. W. 755.

106.——Erasure.—An erasure of the name of an executor then deceased and substitution of another name held not to affect the instrument and the testator therefore died testate, but without naming an executor.—Watson v. Hinson, N. C., 77 S. E. 1089.

107.——Excluding Children.—One may by will dispose of her property to the exclusion of her children.—Ackerman v. Fichter, Ind., 101 N. E. 493.

108.——Parol Evidence.—In construing a bequest, to "my friend Richard H. Simpson," parol evidence is admissible to show that testator intended to make the bequest to "Hamilton Ross Simpson," though testator had an acquaintance named "Richard H. Simpson."—Siegley v. Simpson, Wash., 131 Pac. 479.

109.——Specific Legacy.—A gift of a specific and designated amount of the very shares in a corporation which testator then owned, as, for instance, all of the shares, or one-half of them, or a designated number thereof, is a specific legacy.—In re De Bernal's Estate, Cal., 131 Pac. 375.